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No. 73-543

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE FIRESTONE TIRE & RUBBER COMPANY,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

CALVIN J. COLLIER,
General Counsel,
Federal Trade Commission,
Washington, D.C. 20580.

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MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

Petitioner ("Firestone") seeks review of a decision by the court of appeals affirming an order of the Federal Trade Commission. The order directs Firestone to cease and desist from making representations regarding the safety or performance characteristics of its automobile tires, unless such claims are substantiated by "competent scientific tests."

1. In 1967 and 1968 Firestone represented, in nationwide magazine advertisements, that its Super Sports Wide Oval tires "stop 25% quicker." Based on this and another advertisement disseminated by Firestone[1], the

[1] The other advertisement related to the "safety" of Firestone tires.

Federal Trade Commission issued an administrative complaint charging petitioner with false and misleading advertising in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

At the hearing, Firestone introduced the results of a single stopping-distance test to support its "stops 25% quicker" claim. This test consisted of ten comparative runs between Firestone Wide Oval tires and similar tires of standard tread width (J. App. 95-96, 115).

To place petitioner's test result in context, counsel supporting the complaint presented testimony by Dr. F. Cecil Brenner, Chief of the Tire Systems Section of the National Bureau of Standards. Dr. Brenner stated that the particular road surface used in Firestone's test was equivalent to "glare ice" and said it was not typical of road surfaces in the United States (J. App. 192-193). Moreover, Dr. Brenner indicated that the tires compared might not react in the same relative way on dry surfaces as they had on wet (J. App. 193-194).

The hearing examiner upheld the complaint. The Commission affirmed the examiner's decision. It found that Firestone's "stops 25% quicker" claim implied substantiation by scientific testing (J. App. 20, 30). It concluded that Firestone's single stopping test, conducted on one atypical surface from one speed, did not substantiate this broad claim (J. App. 20, 31). The Commission ordered Firestone to cease and desist from, *inter alia* (J. App. 70):

> 5. Representing, directly or by implication, that any of [petitioner's] automobile tires have any safety or performance characteristic or are superior in quality or performance to other products unless each such characteristic was fully

> and completely substantiated by competent scientific tests * * *.

The court of appeals unanimously affirmed the Commission's order (Pet. App. 10a-11a):

> [W]e conclude that the Commission's finding (that Firestone's "broad stopping claim" was "unfair and deceptive to consumers" because it was "without substantial scientific test data to support it") was supported by the evidence in this record * * *.
>
> As to Firestone's third argument regarding the "stops 25% quicker" ad, we find no overbreadth or violation of due process in the cease and desist order paragraph 5.

2. The decision below is correct and the petition for certiorari raises no question warranting further review.

The Federal Trade Commission has wide discretion in determining what remedy is necessary to eliminate unfair or deceptive trade practices, and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611-613.[2]

Petitioner argues that paragraph 5 of the Commission's order—requiring that tire safety and performance claims be substantiated by competent "scientific tests"— is overly broad and inconsistent with the prior decision of the Commission in *Pfizer, Inc.*, 81 F.T.C. 23.

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[2] See also: *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473-476; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395; and *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-431.

In *Pfizer*, the complaint charged unfair and deceptive practices in connection with the advertising of a drug product for the treatment of minor burns and sunburn. The Commission held that "it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim without a reasonable basis for making that claim" (81 F.T.C. at 62). The complaint was dismissed, however, because the issue as to the correct legal standard to be applied was not satisfactorily raised and because complaint counsel had failed to prove that the product's advertising represented that its claims had been substantiated. With respect to "[t]he question of what constitutes a reasonable basis," the Commission observed that "there may be some types of claims for some types of products for which the only reasonable basis, in fairness and in the expectations of consumers, would be a valid scientific or medical basis" (*id.* at 64).

In the present case, the Commission found that Firestone's "stops 25% quicker" advertisement was deceptive because it implied prior substantiation although petitioner had failed adequately to substantiate its claim. Based on this finding, the Commission ordered Firestone to substantiate its future tire safety and performance claims by competent scientific tests. The Commission explained that (J. App. 49-50):

> [A] scientific test is one in which persons with skill and expertise in the field conduct the test and evaluate its results in a disinterested manner using testing procedures generally accepted in the profession which best insure accurate results. This is not to say that [petitioner] always must conduct laboratory tests. The appropriate test depends on the nature of the claim made. Thus a road or user

> test may be an adequate scientific test to substantiate one performance claim, whereas a laboratory test may be the proper test to substantiate another claim. [Petitioner's] obligation is to assure that any claim it makes is adequately substantiated by the results of whatever constitutes a scientific test in those circumstances.

The Commission deemed substantiation by scientific testing necessary because (J. App. 31-32):

> The ["stops 25% quicker" claim] involves a matter of human safety. It is a claim which consumers themselves cannot verify since they have neither the equipment nor the knowledge to undertake the complicated tire tests required. They must rely on the technical expertise of the manufacturer to assure the validity of its claims. Under such circumstances, it is both unfair and deceptive to consumers to make a specific advertising claim without substantial scientific test data to supprt it.

The requirement that Firestone substantiate its tire safety and performance claims by competent scientific testing thus is reasonably related to the violations found by the Commission and consistent with the decision in *Pfizer*. The remedy is no broader than "is necessary to eliminate the unfair or deceptive trade practices which have been disclosed" (*Siegel, supra*, 327 U.S. at 612).[3]

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[3] A particular remedy is not invalid because in other cases involving a similar problem the agency has selected narrower relief. Cf. *Butz* v. *Glover Livestock Commission Co., Inc.*, 411 U.S. 182, 187.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CALVIN J. COLLIER,
General Counsel,
Federal Trade Commission.

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